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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

HOTEL EMPLOYEES LOCAL NO. 255, HOTEL AND RESTAURANT EMPLOYEES AND BARTENDERS INTERNATIONAL UNION, ET AL.,

Petitioners,

v.

BOYD LEEDOM, individually and as Chairman, National Labor Relations Board, et al.

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

BRIEF OF PETITIONER

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INDEX

Page

Opinions Below 1

Jurisdiction 2

Statutes Involved 3

Questions Presented 4

Introductory Statement 4

Statement of the Case 5

Summary of Argument 9

Argument

I. The National Labor Relations Board Has Violated The Applicable Decision of This Court by Excluding The Entire Hotel Industry From Coverage of the Act 11

A. The Exclusion of the Entire Hotel Industry Contravenes the Decision of the Majority of This Court in *Office Employees* 11

B. Assuming Arguendo That the Board May Exclude Industries for Proper Reasons, the Board's Reason for Excluding the Entire Hotel Industry Is Not Proper 13

1. The Board Excludes Hotels Because of Its Finding That Congress intended to Exempt the Industry 13

2. There Is No Basis For a Finding of Congressional Intent to Exclude the Hotel Industry 16

II. The National Labor Relations Board Does Not Have Discretionary Authority Under Section 9(c) Of The Act To Refuse To Assert Jurisdiction When A Question of Representation Affecting Commerce Exists 20

III. The National Labor Relations Board May Not, Consistent With The Administrative Proce-

Page

dures Act and The Requirements Of The Fifth Amendment, Establish Jurisdictional Rules Without Affording Interested Parties An Opportunity To Be Heard 24

Conclusion 27

Appendix 28

AUTHORITIES CITED

Cases:

Air Line Dispatchers Ass'n. v. *National Mediation Board*, 189 F. (2d) 685, 688 (CA-DC 1952) 3

All Hotel Members of Miami Beach Hotel Association, 10-RC-3135 ..... 5, 6

Amalgamated Meat Cutters v. *Fairlawn Meats*, 353 U.S. 20 (1957) 24

American Furniture Co., 116 NLRB 1496 (1957) ... 15

Anti-Facist Committee v. *McGrath*, 341 U.S. (1951) 165 26

Bickfords, Inc., 114 NLRB 493 (1954) 15

Brown-Olds Co., 115 NLRB 594 (1956) 23

Bullocks, Inc., 119 NLRB 86 (1957) 15

Columbia Broadcasting System v. *United States*, 316 U.S. 407, 422 (1942) 25

Commissioner of Internal Revenue v. *Glenshaw Glass Company*, 348 U.S. 426, 31 (1955) 20

Connecticut Bank and Trust, 114 NLRB 1293 (1955) 15

Consolidated Edison Co. of New York v. *NLRB, et al.*, 305 U.S. 197 (1938) 26

DePratter v. *Farmer*, 232 F. (2d) 74, (CA-DC 1956) 3

Ex Parte Collett, 337 U.S. 55, 61 (1949) 23

Farmer v. *The United Electrical Workers*, 211 F. (2d) 36 (CA-DC 1953) cert. denied 347 U.S. 943 3

Fay v. *Douds*, 172 F. (2d) 720, (CA-2, 1949) 3

Gene Comptons Corp., 116 NLRB 1944 (1956) 15

Greenberg Mercantile Co., 112 NLRB 710 (1955) ... 15

Guss v. *the Utah Labor Relations Board*, 353 U.S. 1 (1957) 24

Hamilton Realty Corporation, 10 NLRB 858 (1938) 17

Page

Inland Empire District Council, etc. et al. v. *Millis*, 325 U.S. 697, 700 (1945) 2, 21
Kyne v. *Leedom*, 249 F. (2d) 490, (CA-DC 1957), cert. granted 355 U.S. 922 3
Leedom, et al. v. *International Union of Mine, Mill and Smelter Workers*, 352 U.S. 145, (1956) affirming 226 F. (2d) 780, (CA-DC 1955) 2
Miami Beach (Case No. 10-CA 577) 18
NLRB v. *Eanet*, 179 F. (2d) 15, 18 (fn. 1) (1949) .. 18
NLRB v. *Denver Building Council*, 341 U.S. 675 (1950) 22
NLRB v. *Stoiler*, 207 F. (2d) 305 (CA 9-1953) 22
NLRB v. *Townsend*, 185 F. (2d) 378 (CA 9-1950) .. 22
Office Employees v. *NLRB*, 353 U.S. 313 (1957) ... 8, 9, 11, 12, 13, 15, 26
Optical Workers v. *NLRB*, 227 F. (2d) 687 (CA 5-1955) 22
Parkside Hotel (*Eanet*), 74 NLRB 809 (1947) 17
Peoria Union Stock Yard Co., 116 NLRB 263 (1956) 15
Peters v. *Hobby*, 369 U.S. 331, 345 (1955) 20
P. V. Atlas Industrial Center, 112 NLRB 1175 (1955) 15
Raleigh Hotel Company, 7 NLRB 353, 356 (1943) .. 17
Raleigh Hotel Company, 49 NLRB 777 (1954) 17
Rutland Court Owners, Inc., 44 NLRB 587 (1942) .. 17
San Diego Building Trades Council v. *Garmone*, 353 U.S. 26 (1957) 24
St. Louis Hotel Association, 92 NLRB 1588 (1951) .. 6, 13, 14, 26
Santa Cruz Packing Co. v. *NLRB*, 303 U.S. 453 (1938) 26
Union News, 112 NLRB 584 (1955) 15
Westchester Apartments, Inc., 17 NLRB 433 (1939) 17
White Sulphur Springs, Inc., 85 NLRB 1487 (1949) 26
Willard Hotel, 2 NLRB 1094 (1937) 17

Page

Constitution and Statutes:

U. S. Constitution:
Fifth Amendment 10

Administrative Procedure Act (Act of June 11, 1946, ch. 324 § 2, 60 Stat. 237, 5 U.S.C. 1001, *et seq.*):
Sections:
1 (c) 3, 25, 31
3 (a) 3, 25, 32
3 (b) 3, 25, 33
3 (c) 3, 25, 33

Labor Management Relations Act, 1947 (Act of June 23, 1947, c. 120, 80th Cong., 1st Sess. 61 Stat. 136, 29 U.S.C. 151 *et seq.*):
Sections:
2 (2) 3, 9, 11, 12, 28
2 (6) 3, 12, 28
2 (7) 3, 17, 28
9 (c) 3, 4, 9, 22, 29
9 (d) 3, 30
10 (a) 3, 22, 30
10 (f) 3, 31

Other Authorities:

Sen. Rep. No. 105, 80th Cong. 1st Sess., 93 Cong. Rec. 4143, pp. 10, 25 .....
National Labor Relations Board, *Sixteenth Annual Report* (U.S. Gov't. Print. Off., 1952) 17

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BRIEF OF PETITIONER

OPINIONS BELOW

The opinion of the United States District Court for the District of Columbia entered on the 8th day of January, 1957 is reported at 147 F. Supp. 306, and reprinted in the record (R. 80-85). The opinion of the Court of Appeals affirming *per curiam* "on the opinion of the District Court" and the dissenting opinion of Judge Fahy are reported at 249 F. 2d 506 and reprinted in the record (R. 86-88).

JURISDICTION

The judgment and order of the Court of Appeals was entered on October 24, 1957. The petition for writ of certiorari was filed on December 13, 1957 and was granted on March 3, 1958. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

The original jurisdiction of the District Court was invoked under 28 U.S.C. 1331 in that the matter in controversy exceeded $3,000.00, exclusive of interest and costs and arose under the Constitution and laws of the United States; and also under 28 U.S.C. 2201 to declare the rights and legal relations of the parties under the Labor Management Relations Act, 1947.

The complaint alleged in substance, as to jurisdiction, that the decision and order of the National Labor Relations Board: (1) violated the constitutional guarantees of due process and equal protection under Amendment V of the Constitution; (2) was an unlawful assumption of legislative power in violation of Article I, Section 8 of the Constitution; (3) was in excess of statutory authority and especially the authority conferred by Section 9(c) of the Labor Management Relations Act, 1947; and (4) was promulgated in violation of the Administrative Procedures Act. The complaint further alleged that the Plaintiff had exhausted its administrative remedies. (R. 6-8)

The District Courts have uniformly exercised their general equity jurisdiction where the action of an administrative agency is alleged to have been in excess of statutory authority, or in violation of constitutional rights. Cf. *Inland Empire District Council, etc., et al* v. *Millis*, 325 U.S. 697, 700 (1945).

The original jurisdiction of the District Court was sustained below on authority of *Leedom, et al.* v. *International Union of Mine, Mill and Smelter Workers*, 352 U.S. 145

(1956), affirming 226 F. (2d) 780, (CA-DC, 1955); *Farmer* v. *The United Electrical Workers*, 211 F. (2d) 36 (CA-DC 1953), cert. denied 347 U.S. 943; *DePratter* v. *Farmer*, 232 F. (2d) 74, (CA-DC 1956); *Fay* v. *Douds*, 172 F. (2d) 720, (CA-2, 1949); *Air Line Dispatchers Ass'n.* v. *National Mediation Board*, 189 F. (2d) 685, 688, (CA-DC 1951); and *Kyne* v. *Leedom*, 249 F. (2d) 490, (CA-DC 1957), cert. granted 355 U.S. 922.

The exercise of the general equity jurisdiction of the District Court in the instant case is particularly appropriate, since it is the only available means of obtaining judicial review of an administrative action excluding an entire segment of the population from the coverage of the Labor Management Relations Act, 1947.[1]

The original jurisdiction of the District Court was, therefore, properly invoked.

STATUTES INVOLVED

Sections 2(2), (6), (7); 9(c), (d); 10(a), (f) of the Labor Management Relations Act, 1947 (Act of June 23, 1947, c. 120, 80th Cong., 1st Sess., 61 Stat. 136, 29 U.S.C. 151 *et seq.*); and sections 1(c); 3(a), (b), (c) of the Administrative Procedures Act (Act of June 11, 1946 Ch. 324, Sec. 2, 60 Stat. 237, 5 U.S.C. 1001 *et seq.*) are set forth in the appendix hereto.

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[1] The General Counsel dismissed the unfair labor practice charge in the instant case because of the Board's announced jurisdictional policy (R. 6). Therefore, a review of such a policy under Sections 9(d) and 10(f) would never be possible.

The Board's questioning of jurisdiction would appear to be at odds with its announced policy in *Breeding Transfer, Inc.*, 110 NLRB 493, 495, in which the Board stated:

> "We, of course, concede that this Board, like any other quasi-judicial agency, has no authority to act capriciously or arbitrarily. This is a fundamental and wholly salutary rule of law which governs our action on jurisdiction as well as every substantive decision which we make. We have no doubt that the Courts will scrutinize our new jurisdictional policy in the light of this accepted principle of American jurisprudence."

QUESTIONS PRESENTED

1. Whether the National Labor Relations Board may, consistent with the applicable decision of this Court, exclude an entire industry from coverage of the Labor Management Relations Act, 1947 regardless of that industry's impact on commerce.

2. Whether the National Labor Relations Board has discretionary authority under Section 9(c) of the Act to refuse to assert jurisdiction when a question of representation affecting commerce exists.

3. Whether the National Labor Relations Board may, consistent with the Administrative Procedures Act and the requirements of the Fifth Amendment, establish jurisdictional rules without affording interested parties an opportunity to be heard.

INTRODUCTORY STATEMENT

The instant case is a part of the same labor controversy presently pending before this court in cases Nos. 5 and 6 October term, 1958 concerning the hotel industry in Miami and Miami Beach, Florida. In the instant case the petitioners endeavored to obtain a factual determination by the National Labor Relations Board as to their majority status as representative of the employees involved and also to obtain National Labor Relations Board intervention to prevent activities of the hotel employers in contravention of the Labor Management Relations Act, 1947. In cases Nos. 5 and 6 are set forth the results in the Florida Courts when the employees were frustrated in their peaceable attempts to secure recognition of their bargaining representative and resorted to strikes and picketing.

STATEMENT OF THE CASE

Petitioners seek a reversal of the judgment and order of the United States Court of Appeals for the District of Columbia Circuit entered October 24, 1957, affirming the judgment of the District Court granting respondents' motion for summary judgment, overruling petitioners' motion for summary judgment, and dismissing the cause.

The facts involved herein, none of which are in dispute, are as follows:

Petitioner Hotel Employees Local No. 255 is a labor organization affiliated with petitioner Hotel and Restaurant Employees and Bartenders International Union. Both the Local and the International Union represent persons employed in the hotel industry.

Petitioner Local 255 at all times mentioned in the complaint represented a majority of the employees of the hotel members of the Miami Beach Hotel Association. Petitioner Local 255 sought to obtain recognition by these hotels and the Association as the collective-bargaining representative of said employees. The hotels and the Association refused and there were 22 separate strikes by said majority of employees for recognition. (R. 24)

On June 29, 1955, a representation petition was filed with the National Labor Relations Board in accordance with section 9 (c) of the Labor Management Relations Act, 1947, and in accordance with the regulations prescribed by the Board. This proceeding was captioned *All Hotel Members of Miami Beach Hotel Association,* 10-RC-3135. The petition was dismissed on July 1, 1955, without investigation and without any determination as to whether there was a reasonable cause to believe that a question of representation affecting commerce existed. The dismissal by the Regional Director of the National Labor Relations Board was based solely on a "long standing

policy not to exercise jurisdiction over the hotel industry." (R. 13)

Petitioners appealed to the National Labor Relations Board requesting that the Board over-rule the Regional Director, order him to investigate the representation petition, hold a hearing, and proceed to an election. Three of the five Board members refused this request, stating that "The Board has decided to adhere to the long-established policy of not asserting jurisdiction over the hotel industry on the grounds set forth in *St. Louis Hotel Association*, 92 NLRB 1388". Board Member Murdock stated that he "would over-rule the Regional Director and direct that the case be sent to hearing and on the basis of a full record determine the impact of the operation of the employer herein on commerce". Board Chairman Guy Farmer stated "that the board should give consideration after hearing to modifying its policy so as to take jurisdiction on a limited basis pursuant to appropriate standards." (R. 18, 19)

Requests of petitioners for reconsideration were denied by the National Labor Relations Board on October 10, 1955, and January 27, 1956, respectively.

On July 7, 1955, during the pendency of the aforementioned representation proceedings, Local 255 filed unfair labor practice charges with the Regional Director of the Tenth Region alleging multitudinous violations of the Labor Management Relations Act (R. 35-62). These charges were held in abeyance until the decision of the Board in the representation matter at which time they were dismissed in conformity with the Board's policy on jurisdiction (complaint, par. 17, R. 6). An appeal from the dismissal of these charges was taken to the General Counsel who sustained the dismissal on the basis of the Board's aforementioned decision in the representation case, *All Hotel Members of Miami Beach Hotel Association*, 10-RC-3135 (complaint, pars 18, 19, R. 6).

The hotel industry is the 7th largest industry in the United States. Its total annual business volume in 1954 was approximately 7½ billion dollars. Over 500,000 persons are employed in the industry. It is an industry which is engaged in interestate commerce and it is an integral and necessary part of interstate transportation (R. 29).

The Miami Beach Hotel Association is a trade association having a membership of more than 150 hotels in the Miami Beach, Florida, area. The Association and its individual members are employers engaged in interstate commerce; their operations individually affect commerce; and a labor dispute with said Association or its members would tend to hinder and obstruct commerce and the free flow of commerce, all within the meaning of the Labor Management Relations Act, 1947 (complaint, par. 8, R. 3, 4).

Southern Florida has 2½ million visitors a year from other states, and a great majority of them are accommodated by the members of the Miami Beach Hotel Association. The Association member hotels, for the year ending September 1954, received over $101 million for food and lodging furnished visitors to the State of Florida. The hotel business is by far the leading industry of southern Florida. It is an integral part of interstate transportation and, during the year ending September 1954 the airlines alone transported 1,200,000 tourists to the Greater Miami area. A substantial number of these tourists came to the Association member hotels under contracts arranged outside the State of Florida for "package tour vacations" providing a single rate for travel to Miami Beach, hotel accommodations, meals, and return travel (R. 20-22).

On January 12, 1956 the complaint was filed in the U.S. District Court for District of Columbia praying for a declaratory judgment that the Board may not withold its processes and the benefits of the act on the sole grounds

that hotels are involved; that the Board's order be set aside; that the Board be directed to investigate, hold a hearing, conduct an election and certify the results, and that the Board be enjoined from withholding its processes and facilities on the sole ground that hotels are involved.

The Board filed a motion to dismiss for lack of jurisdiction, or, in the alternative, for summary judgment in its favor. The petitioners likewise moved for summary judgment in the District Court. Thus the commerce facts set forth above and alleged in the complaint and supporting affidavits are assumed to be true for the purposes of this review.

The District Court refused to dismiss for lack of jurisdiction but granted the Board's alternative motion for summary judgment on the ground that the hotel policy was not arbitrary or capricious (R. 85). The order dismissing the complaint was entered on January 16, 1957 (R. 85).

The Court of Appeals for the District of Columbia Circuit, on appeal, affirmed the judgment of the District Court *per curiam* "on the basis of the opinion of the District Court." Judge Fahy, dissenting, (R. 86-88) would have reversed the District Court, reasoning: (1) that section 9(c) of the Act was mandatory on the Board, and (2) that the exclusion of the hotel industry as a class was contrary to this Court's decision in *Office Employees* v. *NLRB*, 353 U.S. 313 (1957).

The judgment and order of the Court affirming the District Court was entered on October 24, 1957 (R. 89).

This court granted certiorari on March 3, 1958 (R. 90).

SUMMARY OF ARGUMENT

I

The refusal of the National Labor Relations Board to assert any jurisdiction over the entire hotel industry, in effect, engrafts a blanket exemption upon the Labor Management Relations Act, 1947 for hotels. This contravenes the decision of the majority of this Court in *Office Employees* v. *National Labor Relations Board*, 353 U.S. 313 (1957), since (1) hotels are employers within the meaning of section 2 (2) of the Act, and (2) the Board has excluded hotel employers as a class.

Even the minority view in *Office Employees* requires a reversal in this case because the Board's reason for excluding hotel employers as a class is not a proper reason. The Board's exclusion of the hotel industry is based on its view that when Congress enacted the Labor Management Relations Act, 1947 it adopted an existing Board policy to exclude hotels. The reason is not proper since there was no such announced Board policy in 1947 and there is no showing that Congress was aware in 1947 of any unannounced policy to exclude the hotel industry.

II

The National Labor Relations Board does not have authority to dismiss representation proceedings under section 9 (c) of the Labor Management Relations Act, 1947 when a question of representation affecting commerce exists. In 1947 Congress placed a mandatory duty on the Board in representation cases by changing the language of section 9 (c) of the Wagner Act from "may" to "shall" in the present Act.

A comparison of the present mandatory language of section 9 (c) with the discretionary language of section

10 (a), providing that the Board is "empowered" to correct unfair labor practices, shows that when Congress intended discretionary authority it so stated. Nothing in the legislative history of the Act mitigates the duty imposed by section 9 (c).

III

The Board's policy of excluding hotels and the use of pre-determined general jurisdictional standards violates the requirements of the Administrative Procedures Act, and the Fifth Amendment. The policy of excluding hotels from the coverage of the Act is a "rule", and the requirements of notice, hearing and publication required by 5 U.S.C. 1003 *et seq.* were not met in the formulation of that rule. The decision herein, based upon said rule, is therefore void.

Even if the Administrative Procedures Act did not apply, the instant decision was formulated contrary to the requirements of due process of law. The Board has never heard evidence of the effect of the entire hotel industry on commerce, and neither the petitioner nor any other interested party was given an opportunity to be heard prior to the formulation of the rule excluding hotels from the coverage of the Act. Due process is not satisfied by an administrative order issued without basis in evidence or without a hearing.

ARGUMENT

I.

THE NATIONAL LABOR RELATIONS BOARD HAS VIOLATED THE APPLICABLE DECISION OF THIS COURT BY EXCLUDING THE ENTIRE HOTEL INDUSTRY FROM COVERAGE OF THE ACT.

A. The Exclusion of the Entire Hotel Industry Contravenes the Decision of the Majority of This Court in OFFICE EMPLOYEES.

The refusal of the National Labor Relations Board to assert any jurisdiction over the entire hotel industry, in effect, engrafts a blanket exemption for hotels upon the Labor Management Relations Act, 1947. Such refusal contravenes the decision of the majority of this Court in *Office Employees* v. *National Labor Relations Board*, 353 U.S. 313 (1957). The same two basic questions are presented here that were presented in that case, namely:

1. Does the Act apply to a hotel employer, just as it does to any other employer?

2. May the Board refuse to assert jurisdiction over this entire class of employers?

1.

Section 2 (2) defines employers to whom the Act applies and specifically sets forth those classes of employers which are excluded, i.e., persons subject to the Railway Labor Act, the United States, any wholly owned government corporation, Federal Reserve banks, non-profit organizations, etc. Hotels are included within the general definition of employers and are not one of the specific exceptions.

2.

The second question here, as in *Office Employees*, is whether the Board may refuse to assert jurisdiction over this entire class of employers. This Court answered that very question in *Office Employees* by holding that an arbitrary blanket exclusion of an entire class of employers is beyond the power of the Board. The language of this Court in that regard is paraphrased in the succeeding paragraph to fit the facts in the instant case.

Here the Board has refused to assert jurisdiction over hotels as a class in the face of a clear expression of Congress as set forth in section 2 (2) and 2 (6) that the Act should be applied to all employers who "affect commerce". While it is true that this court has sustained the Board's declination of jurisdiction in certain unfair labor practice cases because the policies of the Act may not have been effectuated in that case, it has never judicially approved the Board's renunciation of jurisdiction over an entire category of employers, *i.e.*, hotels, a most important segment of American industrial life. The discretionary authority of the Board on a case by case basis to exclude employers whose business does not sufficiently "affect commerce" does not authorize the Board to assume Congress's authority to exclude all employers in a particular industry regardless of their impact on commerce. When Congress intended to make such exclusions it did so specifically.

The two-judge majority in the Court of Appeals below, consisting of Judges W. K. Miller and Bastian, ignored this Court's opinion in *Office Employees*. Judge Fahy, dissenting, held that the decision in the instant case is inconsistent with *Office Employees*. He stated as follows:

> "For in the present case the refusal of the Board to go forward was on the basis of a decision to exclude all questions of representation involving hotels. I

> think this is inconsistent with *Office Employees* v. *NLRB*, 353 U.S. 313, in which the opinion was handed down after the present case was decided by our District Court." 249 F. (2d) 507, 8 (R. 87, 88).

Although it is submitted that the majority opinion in *Office Employees* requires a reversal in this case, petitioner feels that it may be of some weight to the Court, and particularly to the minority in the *Office Employees* case, to examine the reason relied upon by the Board in declining jurisdiction over hotels. In the next section therefore, we discuss that reason.

B. Assuming Arguendo That the Board May Exlude Industries for Proper Reasons, the Board's Reason for Excluding the Entire Hotel Industry Is Not Proper.

1. The Board Excludes Hotels Because of Its Finding That Congress Intended To Exempt the Industry.

The Board has consistently based its refusal to assert jurisdiction over the hotel industry on its assumption that Congress intended to exempt the hotel industry from the Act. Such refusal is not based on any finding by it that the hotel business is of a local character. This is clearly set forth in various statements and decisions by the Board.

The reasons originally assigned by the Board for refusing jurisdiction in the instant case are set forth in its decision. (R. 18). Those reasons are:

> "The Board has decided to adhere to the long established policy of not asserting jurisdiction over the hotel industry on the grounds set forth in *St. Louis Hotel Association*, 92 NLRB 1388. Accordingly, the action of the Regional Director was warranted. Member Murdock dissents from the determination of the majority to adhere to a policy of not asserting jurisdiction

> over any hotels without regard to their impact on commerce, in accordance with his views expressed in detail in his dissent in the St. Louis Hotel Association case."

It is necessary, therefore, to examine the Board's decision in *Hotel Association of St. Louis*, 92 NLRB 1388 (1951). There was no question but that the hotels involved in that case were engaged in interstate commerce.[2]

The two-member dissenting minority stated in regard to commerce, at 92 NLRB 1391:

> "On this record, it cannot be gainsaid that the employers' operations have a substantial and important effect on interstate commerce. Indeed our majority colleagues specifically reject the employers' contention that it is not engaged in commerce within the meaning of the Act."[3]

The three-member majority of the Board in that decision relied entirely on its interpretation of congressional intent, stating at 92 NLRB 1390,

> "We do not believe that a settled policy endorsed by all those members of Congress who have recorded an opinion on the subject, should be lightly overturned by the action of this Administrative Board."

In the petition and affidavits filed in the District Court, petitioners set forth the facts establishing that the hotels involved herein are engaged in interstate commerce. (R. 19-34). The Board has never denied those facts. In fact

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[2] The employer did business amounting to over $15,000,000.00. $6,800,000.00 was received from room rentals, over $2,400,000.00 of which was received from out of state guests. In addition, the employer purchased supplies and equipment from out of state of over $800,000.00 during the year.

[3] The majority stated at 92 NLRB 1389:
". . . the Board recently announced that it would utilize certain standards . . . as a guide in determining whether or not to exercise jurisdiction . . . Were we to judge this case by those standards alone, jurisdiction should be exercised here."

the Board's counsel admitted in the courts below that these hotels are engaged in interstate commerce.[4]

As late as August 7, 1958, the Board stated as follows:

> "The Board's long standing refusal to assert jurisdiction over the hotel industry has rested on a conclusion that Congress intended to exempt the industry." 5 CCH Labor Law Reporter, par. 50,099, 42 LRR 448, 9.

This Court noted in footnote 13 of *Office Employees* v. NLRB, 353 U.S. 319, that the Board refused to assert jurisdiction over the hotel and the taxicab industry. In its latest proposed jurisdictional rules the Board does assert jurisdiction over the taxicab industry, leaving the hotel industry as the only industry which is excluded as a class.[5]

The Board has taken jurisdiction over public restaurants,[6] office buildings,[7] retail department and furniture stores,[8] ice skating rinks,[9] storage warehouses,[10] stock yards housing and feeding hogs,[11] and innumerable other establishments, none of which affect commerce more than hotels.

The Board, under its new standards, asserts jurisdiction over all retail establishments or associations, whose gross annual income is over $500,000.00, with the sole exception

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[4] The Board, in its brief below (p. 24) stated:
"• • • In the instant case it [the decision] stems from a determination that *though power exists* under all the circumstances, including the Board's limited resources, it would not effectuate the policies of the Board to exert it." (emphasis supplied).

[5] 5 CCH Labor Law Reporter, par. 50,092; 42 LRR 363.

[6] *Bickfords, Inc.*, 114 NLRB 493 (1954), *Gene Comptons Corp.* 116 NLRB 1944 (1956).

[7] *Connecticut Bank and Trust*, 114 NLRB 1293 (1955).

[8] *American Furniture Co.*, 116 NLRB 1496 (1957); *Greenberg Mercantile Co.*, 112 NLRB 710 (1955); *Bullocks, Inc.*, 119 NLRB 86 (1957).

[9] *Union News*, 112 NLRB 584 (1955).

[10] *P. V. Atlas Industrial Center*, 112 NLRB 1175 (1955).

[11] *Peoria Union Stock Yard Co.*, 116 NLRB 263 (1956). The Board apparently places greater importance on the housing and feeding of hogs than it does on the housing and feeding of humans.

of hotels. The annual gross income of the hotels involved herein far exceed $500,000.00. Under present Board rules if there were two restaurants next door to each other, but one in a hotel, each doing the same type of business and each having a gross annual income of over $500,000.00, the Board would assert jurisdiction over the one restaurant not located in the hotel, but would refuse to assert jurisdiction over the hotel restaurant, even though the hotel restaurant might be part of a mammoth chain, such as Hilton-Statler, Sheraton, Pick, Schine, etc.

In view of all of the foregoing, it is apparent that the Board's refusal to assert jurisdiction is not based on a finding that the hotel business is of a local character.

Nor is the refusal to act based on budgetary considerations. Any argument to that effect has been obviated by recent congressional action increasing the Board's budget and the Board's expansion of its jurisdictional standards.[12] It is still refusing to act in the hotel industry because of alleged congressional intent to exclude hotels.

If, therefore, the Board is in error in its conclusion that Congress intended to exempt the hotel industry the declination to assert jurisdiction is not for a proper reason.

2. There Is No Basis For a Finding of Congressional Intent To Exclude the Hotel Industry.

The Board's decision that Congress intended to exempt the hotel industry from the Act stems from an assumed approval of a Board policy to exclude hotels by Congress when it enacted the Labor Management Relations Act in 1947. The fallacy of this decision lies in the fact that (1) no such Board policy existed in 1947 or prior thereto and (2) even if such a policy existed in the minds of Board members there is not the slightest indication that Congress was aware of such a policy.

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[12] 5 CCH Labor Law Reporter, par. 50,092; 42 LRR 383

1.

In 1947 and prior thereto every reported decision by the Board demonstrated a policy to assert jurisdiction over the hotel industry.

The first reported case was *Willard Hotel*, 2 NLRB 1094, decided in 1937, wherein the Board found that the unfair labor practices complained of "affected commerce within the meaning of section 2 (6) and (7)" of the Wagner Act: In the case of *Raleigh Hotel Company*, 7 NLRB 353, 356, decided in 1938, the Board in asserting jurisdiction, stated:

> "The operation of the Company * * * has a close intimate and substantial relation to trade, traffic, and commerce within the District of Columbia and tends to lead to labor disputes burdening and obstructing commerce and the free flow of commerce."

See also *Hamilton Realty Corporation*, 10 NLRB 858 (1938); *Westchester Apartments Inc.*, 17 NLRB 433 (1939); *Rutland Court Owners, Inc.*, 44 NLRB 587 (1942); *Raleigh Hotel Co.*, 49 NLRB 777 (1943); *Parkside Hotel* (Eanet), 74 NLRB 809 (1947).

Although counsel for the Board argues that these cases arose in the District of Columbia, it is submitted that they nevertheless evidence that never, prior to 1949, did the Board consider that the Act excluded the hotel industry as an industry, nor did the Board base those decisions on the fact that the hotels were located in the District of Columbia.

The Board also cites its *Sixteenth Annual Report* as authority for the alleged policy. This report was published in late 1952, and covers the operations of the National Labor Relations Board for the year 1951. Significantly, however, diligent research of all preceding annual re-

ports fails to reveal mention of any policy of the Board refusing to assert jurisdiction over hotels. It is submitted that any policy so well and long established (as contended by the Board) would certainly merit mention in some annual report before 1952.

Not only do the decisions of the Board and the annual reports not sustain the Board's contention of policy, but it is clear that such policy was not even apparent on an administrative level within the Board itself. As late as 1949, a local union of the petitioner International filed an unfair labor practice charge against the predecessor to the association involved in the proceedings herein, to-wit, the Miami Beach Hotel Owners Association, Inc., and the Vanderbilt Hotel, a member of said association. The National Labor Relations Board, acting through the Regional Director of the Tenth Region, assumed jurisdiction over these hotel employers in Miami Beach (Case No. 10-CA-577) and issued a complaint on the 6th day of April, 1949. Thereafter, the board entered into separate stipulations and settlement agreements with each of the above employers, thereby dispensing with the necessity of formal hearing and Board order. (R. 62-80).

It is therefore apparent that as late as April, 1949, there was no known policy, even on an administrative level, which precluded the Regional Director of the Tenth Region from asserting jurisdiction over the hotel industry.

In 1949 the Court of Appeals for the District of Columbia recognized that there were no Board decisions prior to 1949 setting forth a policy to exclude hotels. That Court stated in *N.L.R.B* v. *Eanet*, 179 F. (2d) 15, 18 (fn. 1) as follows:

> "Examination of the published indexes and digests of National Labor Relations Board decisions fails to reveal any other decisions upon the policy of the Board in respect to its jurisdiction in the hotel industry, ex-

cept in the *Matter of Willard, Inc.* . . ., 2 NLRB 1094, in which the Board exercised its jurisdiction."[13]

2.

In order to establish its argument of congressional intent, the Board must not only establish that a policy to exclude hotels was in existence in 1947, but also that Congress was aware of such a policy at that time.

As pointed out above, anyone desirous of ascertaining the policy of the Board in regard to hotels in 1947 could, on the basis of all reported decisions and administrative publications, only have come to the conclusion that the Board did assert jurisdiction over hotels. There is no indication whatsoever that Congress had a special knowledge that a contrary policy might have existed in the minds of some Board members or some Board employees.

A thorough and complete search of the legislative history of the 1947 Act has revealed that there is not a single instance where any committee or sub-committee of the House or Senate, or even an individual Congressman or Senator had the slightest awareness of such a policy in 1947.[14] The Board and its counsel have been unable to make any

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[13] Judge Stevens dissenting stated at 179 F(2d) 25:

"The statement of the Board in the *White Sulphur Springs* case that it has been its administrative policy adhered to since 1935 not to assert jurisdiction over the hotel industry overlooks the exercise of jurisdiction by the Board in the instant case. Moreover I think that the Board cannot properly, under the Act, have a general policy which would forbid the exercise of its jurisdiction in a particular case where, as in the instant case, commerce is involved and where, as found in the instant case, the activities of the employer have a substantial relation to commerce and tend to lead to labor disputes burdening and obstructing such commerce and the free flow thereof."

[14] The Board below has relied on a post-enactment statement of Senator Taft to buttress its assertion. That post-enactment statement cannot be deemed an expression of Congressional intent any more than the contrary opinions of five Senators expressed on the floor of the Senate on July 20th and 27th, 1955, Congressional Record, 84th Congress, 1st Session, Volume 101, Part 9, pp 11008, 11636-39.

showing that Congress acted with such knowledge.[15] In the absence of such a showing and in the absence of any pre-1947 published decision or administrative announcement of which Congress could have been aware, it is submitted that there is no basis for a finding of congressional affirmance of a policy to exempt hotels from the operations of the act. cf. *Commissioner of Internal Revenue* v. *Glenshaw Glass Company*, 348 U.S. 426, 431 (1955).

To accept the argument of congressional approval under the circumstances set forth above would be to indulge in fanciful speculation. cf. *Peters* v. *Hobby*, 349 U.S. 331, 345 (1955).

II.

The National Labor Relations Board Does Not Have Discretionary Authority Under Section 9 (c) Of The Act To Refuse To Assert Jurisdiction When A Question Of Representation Affecting Commerce Exists.

In the instant case the National Labor Relations Board has refused to assert jurisdiction in a representation proceedings under section 9(c) of the Act, even though a question of representation affecting commerce exists. The Board's refusal to act is directly contrary to the plain mandatory language of the Act. Section 9(c) provides, in part, as follows:

> "Whenever a petition shall have been filed in accordance with such regulations as may be prescribed by the Board * * * the Board *shall* investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists,

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[15] In *White Sulphur Springs*, 85 NLRB 1487, 1488 (1949), the Board majority conceded the absence of legislative mention of the hotel industry as follows: "Indeed, the absence of mention of this industry in the hearings or debates leading to the 1947 amendments to the original Act indicates a disposition not to question or disturb the Board's policy."

> *shall* provide for an appropriate hearing upon due notice. * * * If the Board finds upon the record of such hearing that such a question of representation exists it *shall* direct an election by secret ballot and *shall* certify the results thereof." (emphasis supplied)

The question, therefore, to be determined is: assuming that the Board has reasonable cause to believe that a question of representation affecting commerce exists, may it refuse to investigate a petition for determination of representation, to provide for a hearing, to conduct an election and to certify the results thereof. It is submitted that the language of section 9(c) requires that the foregoing question be answered in the negative.

The mandatory duty of the Board in the instant case is demonstrated by a comparison of the above quoted section 9(c) and the same numbered section of the repealed Wagner Act, 49 Stat 435, which was before this Court in *Inland Empire District Council, etc. et al* v. *Millis*, 325 U.S. 697, 706, 707 (1945). The former section 9(c) read as follows:

> "(c) Whenever a question affecting commerce arises concerning the representation of employees, the Board *may* investigate such controversy and certify to the parties, in writing, the name or names of the representatives that have been designated or selected. In any such investigation, the Board shall provide for an appropriate hearing upon due notice, either in conjunction with a proceeding under Section 10 or otherwise, and *may* take a secret ballot of employees, or utilize any other suitable method to ascertain such representatives." (emphasis supplied)

In the *Millis* case this Court held that the language of the above quoted Section "the Board shall provide for an appropriate hearing", was mandatory but that the language

"may take a secret ballot . . ." was discretionary. Congress amended the National Labor Relations Act after the *Millis* decision and changed the word "may" to "shall" throughout section 9 (c). It is submitted, therefore, that Congress, in substituting the word "shall" for "may", intended the provisions of section 9 (c) to be thenceforth mandatory.

Also persuasive is the fact that the language of the present section 9 (c) is materially different from section 10 (a), 61 Stat 146, 29 USC 160 (a), which provides for the correction of unfair labor practices. Section 10 (a) provides in part:

> "The Board is *empowered*, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce." (emphasis supplied).

Thus where Congress intended discretionary authority, it so stated by using the specific language "empower". When it intended to impose an unqualified obligation it used the word "shall". Consistent with this distinction, the cases relied on by the Board in support of its alleged discretionary authority[16] relate to unfair labor practices arising under the above quoted section 10 (a).

Judge Fahy, dissenting below, concurred in the foregoing argument as follows:

> "The Act says that the Board shall take jurisdiction of questions of representation affecting commerce. The verb "shall" was incorporated into section 9 (c) by the Taft Hartley Act in place of "may" in the older Wagner Act. The language is also to be contrasted with that relating to unfair labor practice cases, where the Board is not required to file a complaint but is 'empowered' to do so."

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[16] *NLRB* v. *Denver Building Council*, 341 U.S. 675 (1950); *NLRB* v. *Stoller*, 207 F.(2d) 305 (CA 9-1953); *NLRB* v. *Townsend*, 185 F.(2d) 378 (CA 9-1950); *Optical Workers* v. *NLRB*, 227 F.(2d) 687 (CA 5-1955).

The Board has argued that it was not the intent of Congress to impose a mandatory duty on the Board under section 9(c) "in all cases affecting commerce." However, the language of the instant section and specifically the word "shall", is clear and subject to no ambiguity. This Court has consistently adhered to the canon that where statutory language is clear, there is no need to refer to the legislative history. *Ex Parte Collett*, 337 U.S. 55, 61 (1949). In any event, however, there is no congressional expression obviating the positive duty imposed by the language of the statute.[17] It must therefore be assumed that the plain language of the statute represents the intent of Congress.

The Board argument that a mandatory directive under section 9(c) is inconsistent with discretionary authority under section 10(a) is without merit. Congress might quite properly have decided that the Board shall not have discretion to refuse to make *factual* determinations of bargaining status under section 9(c). Conversely, Congress quite properly may have felt that in unfair labor practice cases necessarily involving penalties and the equitable remedy of injunctive relief, the Board and General Counsel should have discretion to prosecute or not to prosecute in the light of the equities of the particular situation, just as prosecuting attorney may decide to prosecute or not to prosecute.[18]

This Court has made clear in recent cases that state courts and agencies may not act in labor relations matters

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[17] The Board cited below *Senate Report 105, 80th Congress, First Session*, pp. 10, 25; 93 Cong. Rec. 4143, as an explanation of the present language of Sec. 9(c). Those portions of the Report cited are inapposite as they deal only with the desire of Congress to permit employers and non-union employees alike to request elections. The Report clearly evidences that the amendment to section 9(c) to include subsections (1), (A) and (B) specifically provided this right, but in no way mitigated the clear meaning of the mandatory language previously referred to.

[18] e.g.: The announced policy of the General Counsel not to enforce the reimbursement penalty of *Matter of Brown-Olds Co.*, 115 NLRB 594 (1956), against unions which conform their contracts to the requirements of Section 8(a) (3) of the Act by September 1, 1958. 42 LRR 9.

affecting commerce covered by the Labor Management Relations Act, 1947, even though the National Labor Relations Board has declined to exercise its jurisdiction.[19] It was argued in those cases that such a holding by this Court would result in the creation of a "no man's land".

The alleged "no man's land", however, is a creation of the Board which is not supported by any expression of Congressional intent. Nothing in the legislative history of the act shows an intent by Congress to confer upon the Board authority to exempt entire industries, or segments of industries from the Labor Management Relations Act, 1947. Further, the legislative history of the Act does not show an intent to grant the Board authority to determine whether or not labor relations of thousands of employers and millions of employees are to be governed by Federal law or to remain entirely ungoverned. This, however, is the result of the Board's present practices.

It is respectfully submitted that the Board's adherence to its statutory duty under section 9(c) will substantially reduce, if not eliminate, a major portion of the so-called "no man's land".

III.

The National Labor Relations Board May Not, Consistent With The Administrative Procedures Act And The Requirements Of The Fifth Amendment, Establish Jurisdictional Rules Without Affording Interested Parties An Opportunity To Be Heard.

If we assume that in certain instances the Board may formulate jurisdictional rules, the validity of the present method of formulation of these rules or standards is subject

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[19] *Guss* v. *the Utah Labor Relations Board*, 353 U.S. 1; Amalgamated *Meat Cutters* v. *Fairlawn Meats*, 353 U.S. 20; *San Diego Building Trades Council* v. *Garmone*, 353 U.S. 26.

to considerable doubt. The Board's jurisdictional rules involved herein were announced in press releases or in individual cases in which the facts were limited to the particular representation question involved.

The Administrative Procedure Act

The jurisdictional rules of the Board whether announced by decision or press release, clearly implement, interpret, and prescribe law or policy, have a future effect, and are of general and particular applicability. They are not interpretive guides developed on a case-by-case basis but rather they are absolute prescriptions to Board agents, as to the future applicability of the Labor Management Relations Act. Accordingly, it is submitted that the jurisdictional standards are "rules" within the meaning of section 1 (c) of the Administrative Procedures Act, 60 Stat. 237, 5 U.S.C 1001 (c). cf. *Columbia Broadcasting System* v. *United States,* 316 U.S. 407, 422 (1942).

There is no claim by the Board that any of its jurisdictional rules, including the exclusion of hotels, have been promulgated in compliance with the notice, hearing and publication requirements of section 3 of that Act, 60 Stat. 239, 5 USC 1003. The Board excuses this omission by pointing out that petitioner had full opportunity to be heard in the instant case. We submit that the Board must follow the law and not what it considers to be an adequate substitute.

Due Process

If we assume that the Administrative Procedures Act does not apply, then accepted judicial procedure and the rudiments of fair play and the due process clause require that parties affected by the formulation of jurisdictional standards be given an opportunity to be heard and to

present evidence as to whether or not any particular proposed jurisdictional rule does in fact effectuate the purposes of the Act. The decisions of this Court have clearly contemplated that jurisdictional issues would be determined on a case by case basis, affording parties an opportunity to be heard. *Consolidated Edison Co. of New York* v. *NLRB, et al.*, 305 US 197 (1938); *Santa Cruz Packing Co.* v. *NLRB*, 303 US 453 (1938); *Office Employees* v. *NLRB*, 353 U.S. 313, 318 (1957).

The history of the formulation of the instant hotel rule demonstrates the Board's disregard of due process. The hotel policy was first adopted in *White Sulphur Springs, Inc.*, 85 NLRB 1487 (1949). The evidence in *White Sulphur Springs* was confined to the operation of the Greenbriar Hotel and the only parties to the proceeding were a small independent union of firemen and policemen and a subsidiary of the Chesapeake & Ohio Railroad. Yet the decision affected every hotel and every hotel employee in the United States. Again in *Hotel Association of St. Louis*, 92 NLRB 1388 (1951), the evidence was limited to the operation of that association. In the instant case the Board's decision was based solely upon "policy" without reference to facts. Due process is not satisfied by such a procedure.[20]

We earnestly and respectfully submit that the National Labor Relations Board has ignored the requirements of

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[20] Mr. Justice Frankfurter's comment contained in his concurring opinion in *Anti-Facist Committee* v. *McGrath*, 341 U.S. (1951) 165 is particularly apposite.

> "The construction placed by the Court upon legislation conferring administrative powers shows consistent respect for a requirement of fair procedure before men are denied or deprived of rights. From a great mass of cases, running the full gamut of control over property and liberty, there emerges the principles that statutes should be interpreted, if explicit language does not preclude, so as to observe due process in its basic meaning."

the Administrative Procedures Act and has shown no respect for the requirements of due process.

CONCLUSION

For the reasons set forth above, the judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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APPENDIX

STATUTES INVOLVED

The relevant portions of the Labor Management Relations Act, 1947, (Act of June 23, 1947, c. 120, 80th Cong., 1st Sess., 61 Stat. 136, 29 U.S.C. § 151, *et seq.*) provide as follows:

Sec. 2 * * *

(2) The term "employer" includes any person acting as an agent of an employer, directly or indirectly, but shall not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof, or any corporation or association operating a hospital, if no part of the net earnings inures to the benefit of any private shareholder or individual, or any person subject to the Railway Labor Act, as amended from time to time, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.

(6) The term "commerce" means trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia, or any Territory of the United States and any State or other Territory, or between any foreign country, and any State, Territory, or the District of Columbia, or within the District of Columbia or any Territory, or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign country.

(7) The term "affecting commerce" means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce.

Sec. 9.

(c) (1) Whenever a petition shall have been filed, in accordance with such regulation as may be prescribed by the Board—

(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employee (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in section (a), or (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in section 9 (a); or

(B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in section 9 (a):

the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of

representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

"(d) Whenever an order of the Board made pursuant to section 10 (c) is based in whole or in part upon facts certified following an investigation pursuant to subsection (c) of this section and there is a petition for the enforcement or review of such order, such certification and the record of such investigation shall be included in the transcript of the entire record required to be filed under section 10 (e) or 10 (f), and thereupon the decree of the court enforcing, modifying, or setting aside in whole or in part the order of the Board shall be made and entered upon the pleadings, testimony, and proceedings set forth in such transcript.

Sec. 10.

(a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in Section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise; **Provided,** That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominantly local in character) even though such cases may involve labor disputes affecting commerce, unless the provisions of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this Act or has received a construction inconsistent therewith.

"(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying for the order of the Board to be modified or set aside. A copy of such petition shall be forthwith served upon the Board, and thereupon the aggrieved party shall file in the court a transcript of the entire record in the proceeding, certified by the Board, including the pleading and testimony upon which the order complained of was entered, and the findings and order of the Board. Upon such filing, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e), and shall have the same exclusive jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact it supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

The relevant portions of the Administrative Procedures Act, (Act of June 11, 1946, ch. 324 § 2, 60 Stat. 237, 5 U.S.C. § 1001, *et seq.*) provide as follows:

Sec. 1001. Definitions. * * *

(c) Rule and rule making.

"Rule" means the whole or any part of any agency statement of general or particular applicability and future effect designed to implement, interpret, or

prescribe law or policy or to describe the organization, procedure, or practice requirements of any agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing upon any of the foregoing. "Rule making" means agency process for the formulation, amendment, or repeal of a rule.

Sec. 1003. Rule making.

Except to the extent that there is involved (1) any military, naval, or foreign affairs function of the United States or (2) any matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts—

(a) Notice; publication and contents.
General notice of proposed rule making shall be published in the Federal Register (unless all persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law) and shall include (1) a statement of the time, place, and nature of public rule making proceedings; (2) reference to the authority under which the rule is proposed; and (3) either the terms or substance of the proposed rule or a description of the subjects and issues involved. Except where notice or hearing is required by statute, this subsection shall not apply to interpretative rules, general statements of policy, rules of agency organization, procedure, or practice, or in any situation in which the agency for good cause finds (and incorporates the finding and a brief statement of the reasons therefor in the rules issued) that notice and public procedure thereon are

impracticable, unnecessary, or contrary to the public interest.

(b) Procedures.
After notice required by this section, the agency shall afford interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity to present the same orally in any manner; and after consideration of all relevant matter presented, the agency shall incorporate in any rules adopted a concise general statement of their basis and purpose. Where rules are required by statute to be made on the record after opportunity for an agency hearing, the requirements of sections 1006 and 1007 of this title shall apply in place of the provisions of this subsection.

(c) Time of publication or service of rules.
The required publication or service of any substantive rule (other than one granting or recognizing exemption or relieving restriction or interpretative rules and statements of policy) shall be made not less than thirty days prior to the effective date thereof except as otherwise provided by the agency upon good cause found and published with the rule.